Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 216 OF 1985
ALAUDDIN J
13 NOVEMBER 1997

Evidence *— Parol evidence rule — Prior separate oral agreement — Evidence of nature, factual background and surrounding circumstances of agreement — Whether ss 91 & 92 of the Evidence Act 1950 precludes admission of oral evidence completely — Whether plaintiff's oral evidence admissible — Evidence Act 1950 ss 91 & 92*

Limitation *— Recovery of land — Commencement of limitation period — When right of action accrued — Clear and unequivocal threat to plaintiff's rights — Whether plaintiff's action time-barred*

The plaintiff company ran a sawmill and timber related business. Before the formation of the plaintiff company in 1970, the company was known as Padang Serai Kilang Papan Co and was dealing in the same business as the plaintiff. Among the partners at that time was one Khor Swee Choon ('the deceased'). The plaintiff was set up and registered in 1970 with the partners of the old company becoming directors of the plaintiff. On 5 October 1970, an agreement was entered into between Padang Serai Kilang Papan Co as the vendor and the plaintiff as the purchaser of the business. According to the plaintiff, the deceased had also verbally agreed to transfer the land, on which the factory and the company premises stood ('the land'), to the plaintiff in consideration for 3,000 shares allotted to the deceased. This contention was supported by PW1 who was present at the time the agreement was signed. The deceased died five days after the agreement was executed. His estate was then distributed to the defendants, being the estate's beneficiaries. On 14 April 1985, the plaintiff issued a writ, seeking a declaration that the land belonged to them. The plaintiff also sought an order that the defendants execute a transfer of the land to the plaintiff and should the defendants refuse to sign all the documents to effect this transfer, the senior assistant registrar of the High Court should be authorized to sign all documents on behalf of all the defendants to effect the transfer of the land. The issues before the court were: (i) whether the plaintiff's claim was statute-barred by the Limitation Act 1953; (ii) whether the defendants have been improperly joined as parties; and (iii) whether the verbal agreement by the deceased to transfer the said land was admissible as evidence of such an undertaking.

Held, allowing the plaintiff's claim:

(1) The plaintiff's claim was for a declaratory relief that the land belonged to them and also to specific performance of the agreement and the verbal agreement between the parties. The plaintiff's action therefore was an action to recover land, falling within the meaning of s 9(1) of the Limitation Act 1953 and the limitation period is 12 years (see pp 595E–I and 596A–D);

Ponnusamy & Anor v Nathu Ram [1959] MLJ 86 and *Nasri v Mesah* [1971] 1 MLJ 32 followed. A

In this case, there was no infringement of the plaintiff's right before the commencement of the action by the plaintiff. An unequivocal threat by the defendants to infringe the plaintiff's right only arose when the defendants filed their defence to the B plaintiff's action. Further, the defendants' application to strike out the plaintiff's claim also constitutes an unequivocal threat to infringe the plaintiff's right. The plaintiff's right was infringed again in 1982 when the plaintiff became aware of the land being distributed to the defendants and the transfer registered. Whichever date was taken for the purpose of calculating the C limitation period, the plaintiff's action was not time-barred. It followed that the defendant's defence of limitation must fail (see pp 596G–I and 597A).

(2) Once the administrators had distributed the estate to the beneficiaries accordingly, they would have had discharged their D duties and would no longer be responsible for the estate. They cannot be made parties to the action. Since the land had been transferred and registered in the defendants' names as beneficiaries, the proper parties to be sued are the defendants. Therefore, the defendants were rightly made parties to the action E (see p 597G–H).

(3) Sections 91 and 92 of the Evidence Act 1950 do not preclude completely the admission of oral evidence. Where there is a prior oral agreement or statement verbally agreed to by the parties at the time of executing the document, pertaining to a matter on F which the document is silent, evidence as to its nature, factual background or surrounding circumstances may be given when such oral agreement is not inconsistent nor contradicts the terms of the document. Thus, the oral evidence adduced by the plaintiff is admissible under provisos (b) and (f) to s 92 of the Evidence Act 1950. As such, the effect of the 5 October 1970 agreement G should not be determined wholly within the four corners of the document but in the context of the circumstances surrounding the transaction (see pp 598E, 599C, I and 600A); *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220 and *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 followed. H

[Bahasa Malaysia summary

Syarikat plaintif mengendalikan suatu perniagaan kilang papan dan berkaitan pembalakan. Sebelum penubuhan syarikat plaintif pada tahun 1970, syarikat tersebut dikenali sebagai 'Padang Serai Kilang I Papan Co' dan menjalankan perniagaan yang sama dengan plaintif. Di antara rakan kongsi pada masa itu adalah seorang yang bernama Khor Swee Choon ('si mati'). Plaintif ditubuhkan dan didaftarkan pada tahun 1970 dengan rakan kongsi syarikat yang lama sebagai

pengarah-pengarah plaintif. Pada 5 Oktober 1970, suatu perjanjian telah diikat di antara Padang Serai Kilang Papan Co sebagai penjual dan plaintif sebagai pembeli perniagaan tersebut. Menurut plaintif, si mati juga telah bersetuju secara lisan untuk memindahmilik tanah, atas mana kilang dan premis syarikat berdiri ('tanah tersebut'), kepada plaintif untuk balasan 3,000 saham untuk diperuntukkan kepada si mati. Hujah ini disokong oleh PW1 yang hadir pada masa perjanjian ditandatangani. Si mati telah meninggal dunia lima hari selepas perjanjian dilaksanakan. Harta pusakanya kemudiannya diagihkan kepada defendan-defendan, yang adalah benefisiari harta pusaka. Pada 14 April 1985, plaintif telah mengeluarkan suatu writ, meminta suatu perisytiharan bahawa tanah adalah kepunyaan mereka. Plaintif juga meminta satu perintah bahawa defendan-defendan melaksanakan pindahmilik tanah kepada plaintif dan sekiranya defendan-defendan enggan menandatangani semua dokumen bagi melaksanakan pindahmilik ini, penolong kanan pendaftar Mahkamah Tinggi haruslah diberi kuasa menandatangani segala dokumen bagi pihak defendan-defendan untuk melaksanakan pindahmilik tanah. Isu-isu di hadapan mahkamah adalah sama ada: (i) tuntutan plaintif dihalang statut oleh Akta Had Masa 1953; (ii) defendan-defendan telah dicantumkan sebagai pihak dengan tidak wajarnya; dan (iii) perjanjian lisan oleh si mati untuk memindahmilik tanah tersebut boleh diterima sebagai keterangan atas akujanji begitu.

Diputuskan, membenarkan tuntutan plaintif:

(1) Tuntutan plaintif adalah untuk relief perisytiharan bahawa tanah itu adalah kepunyaan mereka dan juga kepada pelaksanaan spesifik perjanjian dan perjanjian lisan di antara pihak-pihak. Tindakan plaintif dengan itu adalah satu tindakan untuk mendapat balik tanah, yang dirangkumi oleh lingkungan maksud s 9(1) Akta Had Masa 1953 dan tempoh had masa adalah 12 tahun (lihat ms 595E–I dan 596A–D); *Ponnusamy & Anor v Nathu Ram* [1959] MLJ 86 dan *Nasri v Mesah* [1971] 1 MLJ 32 diikut.

Dalam kes ini, tiada pelanggaran hak plaintif sebelum permulaan tindakan oleh plaintif. Suatu ugutan yang jelas oleh defendan-defendan untuk melanggar hak plaintif hanya timbul apabila defendan-defendan memfailkan pembelaan mereka kepada tindakan plaintif. Selanjutnya, permohonan defendan-defendan untuk membatalkan tuntutan plaintif juga membentuk suatu ugutan yang jelas untuk melanggar hak plaintif. Hak plaintif telah dilanggar sekali lagi pada tahun 1982 apabila plaintif mendapati tanah diagihkan kepada defendan-defendan dan pindahmilik didaftarkan. Mengikut mana-mana tarikh yang diambil untuk tujuan mengira tempoh had masa, tindakan plaintif tidak dihalang statut. Ini bermakna bahawa pembelaan had masa defendan mesti gagal (lihat ms 596G–I dan 597A).

(2) Sebaik sahaja pentadbir mengagihkan harta pusaka kepada benefisiari dengan wajarnya, mereka sudah pun melepaskan

kewajipan mereka dan tidak lagi bertanggungjawab atas harta pusaka. Mereka tidak boleh dijadikan pihak-pihak kepada tindakan. Oleh kerana tanah itu telah dipindahmilik dan didaftarkan dalam nama defendan-defendan sebagai benefisiari, pihak yang wajar didakwa adalah defendan-defendan. Maka, defendan-defendan dengan betulnya telah dijadikan pihak-pihak kepada tindakan (lihat ms 597G–H).

(3) Seksyen-seksyen 91 dan 92 Akta Keterangan 1950 tidak mengecualikan secara keseluruhan penerimaan keterangan lisan. Di mana terdapat suatu perjanjian lisan yang terdahulu atau pernyataan yang disetujui secara lisan oleh pihak-pihak pada masa melaksanakan dokumen-dokumen, yang berkaitan dengan suatu perkara yang tidak disebut oleh dokumen, keterangan mengenai sifatnya, latar belakang fakta atau keadaan sekeliling boleh diberikan apabila perjanjian lisan demikian adalah konsisten atau tidak bercanggah dengan terma dokumen. Justeru itu, keterangan lisan yang dikemukakan oleh plaintif boleh diterima di bawah proviso-proviso (b) dan (f) s 92 Akta Keterangan 1950. Oleh itu, kesan perjanjian 5 Oktober 1970 tidak patut ditentukan secara keseluruhan dalam empat penjuru dokumen tetapi dalam konteks keadaan-keadaan yang mengelilingi transaksi (lihat ms 598E, 599C, I dan 600A); *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220 dan *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 diikut.]

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No K–02–778–97.]

Notes

For cases on the parol evidence rule, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1184–1279.

For a case on commencement of limitation period, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1908.

Cases referred to

Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed [1952] MLJ 37 (refd)

Ho Ah Kim v Paya Trubong Estate Sdn Bhd [1987] 1 MLJ 143 (refd)

Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 (folld)

Mt Bolo v Mt Koklan & Ors AIR 1930 PC 270 (refd)

Nasri v Mesah [1971] 1 MLJ 32 (folld)

Ponnusamy & Anor v Nathu Ram [1959] MLJ 86 (folld)

Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight [1983] 1 MLJ 220 (folld)

Tan Siew Gaik v Loke Poh Seong [1978] 2 MLJ 171 (refd)

Wong Sin Meng v Wong Sam Moi [1991] 2 MLJ 227 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92(b), (f)
Limitation Act 1953 ss 6, 9

Jegadeeson Thavasu (*Jega & Associates*) for the plaintiff.
Tan Beng Hong (*Tan Beng Hong & Co*) for the defendants.

Alauddin J: The plaintiff company runs a sawmill and timber related business under the name of Padang Serai Kilang Kayu Sdn Bhd. Its registered address is at Batu 12, Jalan Bagan, Padang Serai, Kedah.

All the defendants are presently registered co-owners of a piece of land comprised in GM 84, Lot No 11, Mukim of Nagalilit, District of Kulim ('the said land').

One Khor Swee Choon ('the deceased') was originally the registered owner of the said land and before his death, was one of the directors of the plaintiff company. The first to the sixth defendants are beneficiaries of the deceased's estate whilst the seventh and eighth defendants are the new joint owners of the said land.

By a writ issued on 14 April 1985, the plaintiff sought a declaration that the said land belongs to them and for an order that the defendants do execute a transfer of the said land to the company and should the defendants refuse to sign all the documents to effect this transfer, then the senior assistant registrar of the High Court be authorized to sign all documents on behalf of all the defendants to effect the transfer of the said land.

Briefly, the plaintiff in their statement of claim stated that prior to 1970, ie before the formation of the plaintiff company, the company was known as Padang Serai Kilang Papan Co carrying on business as a partnership dealing with the same business as the plaintiff company. The partners at that material time were: (i) Tuan Haji Jais Sudin; (ii) Tuan Haji Yahaya bin Talib; (iii) En Ahmad bin Taib; (iv) Khor Swee Heng; and (v) the deceased.

In order to comply with the requirement of the Kedah State Government for the purpose of securing a new licence for the extraction of timber, the company decided to change its status from one of partnership to a private limited company. In pursuance of its objective, the plaintiff company was set up and duly registered in 1970. The partners became the directors of the newly formed company which carried on its usual business on the said land.

To further materialize its intention, an agreement was entered into between Padang Serai Kilang Papan Co as the vendor and Padang Serai Kilang Kayu Sdn Bhd (the plaintiff) as the purchaser on 5 October 1970 ('the agreement').

Under the terms of the agreement, the plaintiff company would have a paid up capital of RM300,000 divided into 30,000 shares of RM10 each. The plaintiff company would acquire and take over the business of Padang Serai Kilang Papan Co. And by virtue of cl 1.1 of the agreement, the

plaintiff agreed to purchase all monies, bills, notes and other negotiable instruments and securities for money investments and the book and other debts of the said business and the full benefit of all contracts and agreements to which the vendors were entitled in relation to the said business. A

Clause 2 of the agreement provides for allotment of shares of the plaintiff company to the vendors and the shares shall be deemed to be fully paid up. Under the same clause, the deceased was allotted the most number of shares, ie 3,000. B

In accordance with cl 1.2 of the agreement, the plaintiff company would also purchase the stock in trade, plant and machinery, land, furniture and fixture, motor vehicles and effects of the said business. C

The plaintiff also claimed that in consideration of the 3,000 shares allotted to him, the deceased had by a verbal agreement agreed to transfer the said land (where the factory and the company premises stood) to the plaintiff company.

It was further contended by the plaintiff that the word 'land' appearing in cl 1.2 of the agreement refers to the said land. This contention was supported by the evidence of PW1 which stated that he was present at the time the agreement was signed. PW1 confirmed that at the time of the taking over of the partnership business by the plaintiff company, the deceased was alloted 3,000 shares in the plaintiff company and in consideration of that, the deceased had agreed to transfer the said land to the plaintiff company. Unfortunately, he died just five days after the agreement was executed. D E

In resisting the plaintiff's claim, the defendants raised the following defences in their statement of defence:

(1) The plaintiff's claim is statute barred by virtue of either s 6 or s 9 of the Limitation Act 1953 ('the Act'). F

(2) The defendants have been improperly joined as parties.

(3) The defendants are under no obligation to comply with the plaintiff's request as the plaintiff's action against the defendants is not maintainable. G

The issue of limitation

It was contended on behalf of the defendants that the plaintiff's action is statute barred. Counsel for the defendants argued that from the statement of claim it would appear that the cause of action was founded on a contract. As such, by virtue of s 6(1) of the Act , he said the cause of action could not be brought after the expiration of six years from the date on which it accrued. He further argued that cl 6 of the said agreement provided that the sale should be completed on or before 30 November 1970. Therefore, time would start to run against the plaintiff from that date or five months after the death of the deceased (on 10 October 1970) when PW2 approached one of the beneficiaries and requested that the said land be transferred to the plaintiff. Since the writ was only issued on 14 April 1985, the plaintiff's action was clearly time barred. H I

A It was further submitted on behalf of the defendants that although the deceased had died on 10 October 1970 and that there was an interval between his death and the extraction of letters of administration, that did not prevent time from running against the plaintiff.

In rebuttal, learned counsel for the plaintiff submitted that the B plaintiff's claim was brought well within time and not time barred. He argued that time would start to run against the plaintiff only after the date the letters of administration was extracted, ie after 19 May 1982. And since the action was filed in 1985, it was well within time.

With the greatest of respect to both learned counsel, I must say that C their assumption of facts and law on this issue is wrong.

Adverting now to what had been pleaded by the plaintiff in their statement of claim coupled with the evidence adduced which was not disputed by the defendants, it would seem obvious that both counsels had overlooked the fact that the said land originally belonged to the deceased. As a matter of fact, he was the only partner who owned property (ie the D said land). The premises of Padang Serai Kilang Papan Co stood on this piece of land. Even after the taking over of the partnership by the plaintiff, the business was pursued on the said land. Thus being the position, the possession of the said land had always been with the plaintiff.

With these facts in mind, let us examine what the plaintiff is claiming E for. Now, the plaintiff's claim is for a declaratory relief that the said land belongs to them and also to specific performance of the agreement dated 5 October 1970 and the verbal agreement between the parties. In my considered opinion, the plaintiff's action therefore is an action to recover land.

F An action to recover land is governed by s 9(1) of the Act which provides:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

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In this connection, the decision of the Court of Appeal in *Ponnusamy & Anor v Nathu Ram* [1959] MLJ 86 bears a lot of relevance. It was held by the Court of Appeal that whether the period of limitation was six years by reason of s 6 or 12 years by reason of s 9 of the Act depends on the nature of the plaintiff's claim. As the plaintiff's claim in that case was for a H declaration that they were entitled to the land, therefore, the action was 'to recover land' within the meaning of s 9 of the Limitation Ordinance (as it was then).

At p 88 of the judgment, Thomson CJ (as he then was) held:

I

> Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within s 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of actions founded on a contract, the period of limitation shall be six years but that provision is expressly stated to be 'save as

> hereinafter provided'. By s 9, however it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

The same view was adopted by the Federal Court in *Nasri v Mesah* [1971] 1 MLJ 32. Gill FJ (as he then was) in his judgment said (at p 33):

> It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

(See also *Ho Ah Kim v Paya Trubong Estate Sdn Bhd* [1987] 1 MLJ 143 and *Wong Sin Meng v Wong Sam Moi* [1991] 2 MLJ 227.)

Based on the authorities indicated above, I hold that the period of limitation in relation to an action for recovery of land, as in this case, is 12 years.

Having said that, the next question for determination is 'when does the time or period of limitation start to run?' In answer to this, I would again refer to the case of *Nasri v Nesah* where the Federal Court held (at p 32):

> Time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach.

In determining when the right to sue arises or accrues in an action founded on any other right, the Privy Council in *Mt Bolo v Mt Koklan & Ors* AIR 1930 PC 270 held that:

> There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

Now, coming back to our case, it would appear that before the commencement of the action by the plaintiff, there was no infringement of the right of the plaintiff. The plaintiff had all along been in possession of the said land. The company's premises had always remained on the said land. As a matter of fact, the company's operation is still being carried on presently on the said land. However, when the defendants filed their defence to the plaintiff's action on 14 April 1991, that would constitute an unequivocal threat to infringe the right of the plaintiff (see *Wong Sin Meng v Wong Sum Moi* [1991] 2 MLJ 227).

The defendants in this case had also applied to strike out the plaintiff's claim on 8 September 1986 which action could also constitute an unequivocal threat to infringe the right of the plaintiff. Again in 1982, the plaintiff became aware that the said land had been distributed to the defendants and the transfer had also been registered. This clearly amounted to an infringement of the plaintiff's right. Whichever date is taken for the

purpose of calculating the limitation period, it does not make the plaintiff's action time-barred. As such, the defence of limitation raised by the defendants must necessarily fail.

Misjoinder of parties

It was argued on behalf of the defendants that the plaintiff's action is not maintainable against them. It was contended that the plaintiff ought to have joined the administrators of the estate of the deceased as defendants. It was further argued on behalf of the defendants that since the letters of administration was issued to Khor Khai Ngo and Khor Chiew Ngo, they both should have been made parties to the action. It was submitted by counsel for the defendants that since the plaintiff was aware that letters of administration had been granted to the estate, they should have brought the action against the personal representative, ie the administrators and not against the defendants who are the beneficiaries of the estate. Learned counsel referred to O 15 r 6A of the Rules of the High Court 1980 in support of his submission.

My answer to learned counsel's submission is quite simple. There is no doubt that the plaintiff's action is founded on agreements entered by the deceased during his life time. The plaintiff here is not asking for the return of the 3,000 shares allotted to the deceased nor for any monetary claims arising from the allocation of shares to the deceased. Their claim is only for a declaration and an order for specific performance of the agreements to clothe them with the legal title in respect of the said land.

The land has now been transferred and registered in the defendants' names as beneficiaries of the deceased's estate. Upon the transfer of the said land and registration executed in favour of all the defendants, the title and interest of the deceased's estate in the said land has now been vested in the beneficiaries (ie defendants). For the purpose of the relief sought by the plaintiff, the defendants are in my opinion, the proper parties to be sued. As for the administrators, once the estate has been accordingly distributed to all the beneficiaries (and in this case the transfers had also been executed), they would have discharged their duties and would no longer be responsible for the estate. Rightly, they cannot be made parties to the action. Therefore, I hold the view that the defendants were properly made parties to this action (see *Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed* [1952] MLJ 37).

I shall now turn to another aspect of the case. According to the evidence of PW1 and PW2, the deceased had agreed to transfer the said land to the plaintiff in return for the 3,000 shares allotted to him. PW1, the sole surviving partner, who was present at the time the agreement was signed, testified that the word 'land' as mentioned in the agreement referred to the disputed land on which the factory stood and at that particular period, the said land was valued at RM30,000. He reiterated that the deceased had undertaken to transfer the said land to the plaintiff company. This verbal agreement made by the deceased was agreed upon by the other directors.

On behalf of the defendants, it was argued that this evidence of the plaintiff with regard to the undertaking by the deceased to transfer the said land to the plaintiff is not admissible. According to counsel for the defendants, the agreement had been reduced into writing but there was no mention about the description of the said land although the word 'land' appeared in cl 1.2 of the agreement. There was also no mention in the agreement that the deceased had agreed to sell his land to the plaintiff. It was counsel's submission that it is a cardinal rule in the interpretation of documents that the intention of parties must be gathered from the written instrument itself and nowhere else. No evidence could be given to add, contradict or vary the contents of the agreement. Counsel relied on s 92 of the Evidence Act 1950 which reads as follows:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to s 91, no evidence of any oral agreement or statement shall be permitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

On the strength of this provision, counsel said the plaintiff is precluded from adducing such evidence.

With respect to learned counsel for the defendants, I am of the opinion that ss 91 and 92 of the Evidence Act 1950 do not preclude the admission of oral evidence completely. The provisions under s 92 reads as follows:

> ...
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
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> ...
>
> (f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

The Federal Court had occasion to consider the admissibility of oral representations under the provision of s 92 of the Evidence Act 1950 in *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220 where it was held (at p 220):

> The prohibition against admissibility of evidence under s 92 only applies where all — as opposed to some only — of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence can be given to prove the terms agreed to orally.

(See also *Tan Siew Gaik v Loke Poh Seong* [1978] 2 MLJ 171.)

In *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243, the Federal Court held that s 91 of the Evidence Act 1950 does not forbid the admission of other evidence where that evidence gives a factual background to the case. Mohd Azmi FJ (as he then was) had this to say at p 247:

A For the construction of a written agreement, the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation B and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible.

Coming back to the present case, I would observe that the effect of the agreement dated 5 October 1970 should not be determined wholly within C the four corners of the document. In my opinion, it must be viewed in the context of the surrounding circumstances of the transaction including the conduct of the parties at the time the agreement was entered into, the nature of the agreement (ie its formality) and also its factual background.

Firstly, what is the nature of the transaction? To my mind, it was a simple taking over exercise from a partnership to a limited company. The D parties to the agreement were none other than the former partners who were also the newly appointed directors of the company. It was just a matter of taking over the business whilst the operation remained the same (ie sawmill and timber related business). The factory premises remained on the said land. The business was taken over lock, stock and barrel, so to E speak. In my considered opinion, in any exercise of this nature, the most logical and appropriate step for the new company to take was to acquire all the assets of the partnership including the land. And to my mind, this could be the most probable thing that could have happened in this case.

Secondly, what is the nature (ie formality) of the agreement? It was F prepared by the secretary, a layman without any legal professional background whatsoever. It was a layman's agreement based merely on understanding and undertaking between the parties who originally were partners and subsequently became directors of the new company. PW1, the sole surviving partner who was present at the time the agreement was signed, gave evidence of such undertaking. I find him to be a witness G of truth. Further, his evidence was corroborated by the evidence of PW2 who was one of the directors in 1970 and presently the managing director of the plaintiff company.

Thirdly, the fact that the plaintiff company still remained in possession of the said land is consistent with the arrangement arrived at between the H parties, ie that the transfer of the land was in consideration of the 3,000 shares allotted to the deceased. Thus, it may legitimately be inferred that that was the arrangement intended by the partners as vendors and the plaintiff as puchasers. It would seem that there is a direct link between the retention of possession of the said land by the plaintiff (as purchaser) and the oral agreement made by the deceased as claimed by the plaintiff.

I I would reiterate that where there is a prior oral agreement or statement verbally agreed to by the parties at the time of executing the document, pertaining to a matter on which the document is silent, evidence relating to its nature (formality), factual background or surrounding circumstances may be given when such agreement is not inconsistent with

or does not contradict the terms of the document. Having said that, in my opinion, the oral evidence adduced by the plaintiff is admissible under provisos (b) and (f) to s 92 of the Evidence Act 1950.

The defendants, on the other hand, never denied the fact that amongst the partners (vendors), the deceased was the only one who owned land and it so happened that the land was the same land on which the factory stood. And since 'land' is mentioned in cl 1.2 of the agreement, I hold the view that the plaintiff had by their pleadings and evidence given a consistent and reasonable explanation as to what had been agreed upon by the parties. In the absence of any evidence to the contrary, the plaintiff's explanation must be accepted.

Finally, I would humbly say that the defendants' defence consists of nothing more than a mere lack of knowledge with regard to the facts pleaded by the plaintiff in their statement of claim.

In the event, I would grant the declaration prayed for by the plaintiff and order that the defendants execute the transfer of the said land in favour of the plaintiff and should the defendants refuse, the senior assistant registrar of the High Court is authorized to effect the transfer.

Plaintiff's claim is allowed with costs.

Plaintiff's claim allowed.

Reported by David Lai